

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**
Norfolk Division

DAMIAN L. BOONE, #320703,

Petitioner,

v.

ACTION NO.
2:05cv731

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions in the Circuit Court of the City of Hampton for malicious wounding, as a result of which he was sentenced on April 28, 2003, to a term of ten years active in the Virginia penal system with another ten years suspended.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. Report of the Magistrate Judge was filed on September 27, 2006, recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On September 15, 2006, petitioner filed a "Motion to Allow Him to Place on the Record the Memorandum of Law Enclosed Herewith" [Doc. No. 16]. The motion is GRANTED, and the memorandum has been considered. On October 5, 2006, the Court received petitioner's objections to the Report and Recommendation. Respondent filed a reply to the

objections on October 13, 2006, and petitioner filed an “Answer” to the reply on October 20, 2006.

The Court notes that the petitioner’s application for a writ of habeas corpus presented five grounds for relief, including three separate claims for ineffective assistance of trial counsel, reflected in his petition as grounds (A), (B), and (C). The petitioner raised his ineffective assistance of appellate counsel as ground (D), and his claim that the evidence was not sufficient to sustain a finding of malice in ground (E). The respondent’s brief addressed the same grounds (A) - (E), adhering to the petitioner’s label of each. Though the Report and Recommendation filed by the United States Magistrate Judge addressed each of the petitioner’s grounds, it did so by consolidating petitioner’s grounds (A), (B), and (C), concerning the alleged ineffective assistance of the petitioner’s trial counsel, into one “Ground (a).” Specifically, the allegations made in petitioner’s ground (A) were contained in the Report and Recommendation’s “Grounds (a)(i)-(vi);” petitioner’s ground (B) was contained in the Report and Recommendation’s “Grounds (a)(vii)-(x);” and petitioner’s ground (C) was duplicative of the grounds addressed in the Report and Recommendation’s “Grounds (a)(vii) and (x).” Consequently, petitioner’s claim of ineffective assistance of appellate counsel, reflected in his petition as ground (D), was characterized in the Report and Recommendation as “Ground (b),” and petitioner’s insufficient evidence claim, reflected in his petition as ground (E), was characterized and discussed in the Report and Recommendation as “Ground (c).”

The Court, having reviewed the record and examined the objections filed by the petitioner to the United States Magistrate Judge’s Report, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report of the United States Magistrate Judge filed September 27, 2006. It is, therefore,

ORDERED that the petition be DENIED and DISMISSED, because petitioner's claims were previously adjudicated by the Virginia Supreme Court on the merits and none of the statutory exceptions apply that would allow this Court to review the claims on the merits.

It is further ORDERED that judgment be entered in favor of the respondent.

Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within 30 days from the date of entry of such judgment.

The Clerk shall mail a copy of this Final Order to the petitioner and counsel for the respondent.

/s/ Jerome B. Friedman

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

November 27, 2006